Supreme Court, U.S.
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No. 95-918

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

THOMAS CHESTER,
Petitioner,
v.
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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January 11, 1996

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STATEMENT REQUIRED BY RULE 29.6

Respondent AT&T Corp. owns an equity interest in the following publicly traded companies:

Compagnie Industriali Riunite, S.p.A. (Italy); and
AT&T Capital Corporation.

AT&T owns an equity interest in the following non-publicly traded companies, which have public debt outstanding:

AT&T Credit Corporation;
AT&T Global Information Solutions Company (formerly NCR Corporation); and
McCaw Cellular Communications, Inc.

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RESPONDENT'S BRIEF IN OPPOSITION

This case does not present the conflicts, statutory questions, or "great miscarriage of justice" (Pet. 7) that petitioner asserts. Instead, in an unpublished per curiam decision, the Fifth Circuit merely affirmed a district court's grant of summary judgment based on a routine application of well-settled legal principles to a particular set of facts.

1. Petitioner was employed by AT&T as an account executive. Pet. App. 5a. On July 30, 1991, AT&T informed him by letter that he was "at risk of involuntary separation from AT&T" and that he could use company resources to try to find another position within AT&T in the next 60 days. *Id.* at 6a. The letter clearly stated that "unless you are notified otherwise, your expected last date of employment will be September 30, 1991." *Id.* at 2a. Despite a 21-day extension, petitioner was unable to find

another position within AT&T, and his employment terminated on October 21, 1991. *Id.*

On July 2, 1992, petitioner filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), alleging that he was "involuntarily retired" and that he believed that AT&T's actions were the result of age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"). *Id.* at 6a. Thereafter, he filed a district court action alleging that AT&T discriminated against him by terminating his employment and by failing to transfer him. *Id.*

The district court granted summary judgment in favor of respondent. The court held that petitioner's discriminatory discharge claim was untimely because he had failed to file his EEOC charge within 300 days of receiving the July 30, 1991 letter that informed him of his impending discharge on September 30, 1991. *Id.* at 8a-12a. The court rejected petitioner's position that the July 30 letter merely informed him that he was "at risk" of discharge, holding that this notice, which specified his termination date, "clearly placed Chester on notice of his impending discharge from the company." *Id.* at 9a.

The court further held that AT&T's representation that petitioner could look for other jobs within the company did not preclude summary judgment. Noting that equitable tolling applies only where an employer intentionally misleads or conceals facts from an employee, the court found that AT&T's actions did not prevent petitioner from recognizing the facts that formed the basis of his asserted claim of discrimination. Indeed, "Chester admitted in his deposition that when AT&T notified him that he was at risk of involuntary separation, he believed the decision was discriminatory." *Id.* at 12a; *cf.* Pet. 13 (characterizing petitioner's belief as mere "suspicion[]"). In addition, petitioner had consulted with counsel who advised him "that he should file the EEOC charge within 300 days after July 30, 1991." Pet. App. 12a n.3.

The district court likewise granted judgment for respondent on petitioner's failure to transfer claim. *Id.* at 12a-14a. The court held that this claim was barred because it was not raised in the EEOC charge. It rejected petitioner's argument that his allegation that he was "involuntarily retired" encompassed both the discharge and the failure to transfer claims, reasoning that "[a] decision to discharge an employee and a decision not to hire that employee for a different position are separate and distinct events." *Id.* at 14a. In addition, the court noted that "[i]t is impossible to glean from Chester's EEOC charge that he intended to allege discrimination based on AT&T's failure to transfer him to other positions." *Id.*

The Fifth Circuit affirmed in a brief unpublished per curiam decision, citing its rule that cases "that have no precedential value and merely decide particular cases on the basis of well-settled principles of law" do not warrant published opinions. *Id.* at 1a n.1.

2. The decisions below raise no issue worthy of this Court's attention. Contrary to petitioner's claims, there is no "conflict" between the Fifth and the Seventh Circuits concerning the federal common law discovery rule used for determining the commencement of the limitations period under the ADEA. This Court established the appropriate legal standard in *Chardon* v. *Fernandez*, 454 U.S. 6, 8 (1981) (per curiam), and *Delaware State College* v. *Ricks*, 449 U.S. 250, 258 (1980), where it held that the limitations period begins to run when the alleged discriminatory act occurs, and not when the plaintiff first feels the consequences of the act.

Petitioner's assertion that the Fifth and Seventh Circuits are using different tests or approaches in applying *Chardon* and *Ricks* to particular fact patterns is flatly refuted by the Seventh Circuit's decision in *Gustovich* v. *AT&T Communications, Inc.*, 972 F.2d 845 (7th Cir.

1992) (per curiam), which is on all fours with this case.[1] In *Gustovich*, AT&T informed several employees on August 1, 1989 that they were being declared "surplus" and that their last day of employment would be September 29, unless they found other jobs within the company by then. *Id.* at 847. None did, and they were terminated on September 29. The court concluded that the 300-day limitations period began to run on August 1, even though the employees had the opportunity to interview within the company and were not actually terminated until September 29. *Id.* This conclusion is fully consistent with the Fifth Circuit's decision in this case that petitioner's limitations period began to run on July 30, 1991, when he was informed of his impending termination. Accordingly, petitioner's proffered "conflict" is nonexistent.

3. The supposed conflict between the Fifth and Eleventh Circuits concerning "certain factual scenarios to which equitable modification principles apply" (Pet. 12) is equally illusory. Petitioner concedes that the legal standards applied by the two circuits "appear[] to be basically the same." *Id.* Indeed, the standards are indistinguishable, and the circuits merely have applied the standards to disparate fact patterns.

As petitioner acknowledges (*id.*), the Fifth and Eleventh Circuits, in addition to others, have observed that equitable tolling involves an employee who acts with reasonable diligence and has not discovered facts that would support a discrimination claim. See *Rhodes* v. *Guiberson Oil Tools Div.*, 927 F.2d 876, 878-79 (5th Cir.), *cert. denied*, 502 U.S. 868 (1991); *Sturniolo* v. *Sheaffer, Eaton, Inc.*, 15 F.3d 1023, 1025 (11th Cir. 1994). Petitioner is manifestly incorrect, however, in suggesting that this case and *Sturniolo* indicate that the Fifth and Eleventh Circuits apply divergent approaches to determine equitable tolling. The respective courts merely made fact-

[1] *Gustovich* is not cited in the petition, even though it post-dates the Seventh Circuit decision on which petitioner relies.

specific determinations as to whether the employees at issue had reasonable notice of their claims. While the Eleventh Circuit concluded that Sturniolo had no reason to suspect age discrimination at the time of his discharge (*Sturniolo,* 15 F.3d at 1025-26), the Fifth Circuit concluded here that equitable tolling did not apply because petitioner admitted that, "at the time that he got the [July 30] notice, he thought that he was being discharged because of his age" and had consulted an attorney who specifically advised him of the applicable filing deadline. Pet. App. 3a-4a. The Fifth Circuit's application of an established legal standard to these particular facts is correct, and in all events not worthy of review.

Petitioner is likewise incorrect in suggesting (Pet. 14) that the circuits take different legal positions on equitable tolling where an employer has made efforts to help employees find new positions. In fact, the Fifth Circuit did not address the significance of AT&T's job placement resources in discussing equitable tolling because, as explained above, it concluded that equitable tolling "cannot apply" to petitioner because he knew of the filing deadline and admitted that he thought he was being discharged because of his age when he received the July 30 letter. Pet. App. 3a-4a. Accordingly, this case simply does not raise any issue concerning the significance of job placement efforts on equitable tolling.

4. None of petitioner's other claims merits review. Petitioner offers no reason for this Court to "modify" the existing "well-settled" principle that separate charges of discrimination must be filed for each separate adverse employment action. Pet. 20, 22. Indeed, petitioner's proposed modification—that employees should be permitted to use "catch-all" phrases when they "intend[]" to complain of multiple adverse actions (*id.* at 21)—would create confusion and wholly undermine the current incentive for employees to be clear and precise in their EEOC charges.

Neither does this case present a "great miscarriage of justice" or misapplication of well-settled summary judgment standards that warrants review. Indeed, petitioner offers no explanation for his failure to meet a filing deadline of which he was well aware.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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